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No. 06-1188

Supreme Court, U.S.
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In The
Supreme Court of the United States

TECK COMINCO METALS, LTD.,

Petitioner,

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL, and STATE OF WASHINGTON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

Her Majesty the Queen in Right of the Province of British Columbia ("British Columbia") respectfully submits this brief in accordance with Supreme Court Rule 37.1.[1] British Columbia asks this Court to grant the petition filed by Teck Cominco Metals, Ltd. and review the decision below of the United States Court of Appeals for the Ninth Circuit.[2]

British Columbia is one of ten Canadian provinces. It has a population of more than four million, the third largest in Canada. British Columbia shares a 1,347-mile border with the United States – 561 miles adjacent to Washington, Idaho, and Montana, and 786 miles adjacent to Alaska. Every American state along the British Columbia-United States border lies within the Ninth Judicial Circuit, making British Columbia more affected than any other Canadian province by the Court of Appeals' decision in this case.

British Columbia, like all Canadian provinces, has significant exclusive and shared governmental powers under the Canadian Constitution. *See* Can. Const. art. VI,

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[1] The parties have consented to the filing of this brief. Letters indicating their consent have been filed with the Clerk of the Court. This brief was authored by Dorsey & Whitney LLP, counsel for British Columbia. Pursuant to Rule 37.6, British Columbia hereby affirms that no counsel for a party authored this brief in whole or in part, and that no persons or entities other than the province made any monetary contribution to the preparation or submission of this brief.

[2] The Court of Appeals' decision below, *Pakootas v. Teck Cominco Metals, Ltd.* (Ninth Circuit Case No. 05-35153), is reprinted in the appendix to the petition and is published at 452 F.3d 1066.

§ 92 (Constitution Act, 1867) (granting certain exclusive powers to the provincial legislatures). The Canadian federal system of allocating powers between the federal and provincial governments is comparable to, but not identical to, the American federal system. *Compare id.* art. VI, §§ 91 & 92 (allocating powers between federal and provincial governments) *with* U.S. Const. art. I, § 8 & amend. X (allocating powers between federal and state governments).

In Canada, environmental regulation, including regulation of discharges into the environment and remedial regulation governing cleanup of polluted sites, is largely a provincial responsibility. *See, e.g.*, *The Queen in Right of Alberta v. Friends of the Oldman River Soc'y*, [1992] 1 S.C.R. 3 (Can.) (explaining the federal-provincial division of environmental regulatory authority under Sections 91 and 92 of the Constitution Act, 1867); *Canadian Nat'l Ry. Co. v. Director Under the Envtl. Prot. Act*, [1991] 3 O.R.3d 609, ¶43 (Ont. Div. Ct.) ("Pollution is not a single matter assigned by the Constitution exclusively to one level of government. It is an aggregate of matters, which come within various classes of subjects, some within federal jurisdiction and others within provincial jurisdiction."). Although the American statute at issue in the Court of Appeals' decision, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, is a federal act, the comparable Canadian version of CERCLA is Part 4 of the British Columbia Environmental Management Act, S.B.C. 2003, Ch. 53 (Contaminated Site Remediation).[3] Thus, the

[3] For purposes of this brief, general references to "Canadian law" mean both federal and provincial law, whichever is applicable in a

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Court of Appeals' decision holding that an American federal statute could apply to conduct that occurred entirely in Canada specifically impacts British Columbia's jurisdiction to regulate environmental cleanup necessitated by pollution produced within the province, and the province of British Columbia has a significant interest in Teck's petition for certiorari.

In explaining that Canada's counterparts to CERCLA are provincial rather than federal, British Columbia does not mean to suggest that Part 4 of the Environmental Management Act would exclusively regulate the cleanup of the Columbia River site. Rather, as more fully discussed in the argument section of this brief, *see infra* § C, international law and principles of comity require that instances of cross-border pollution such as that in this case be addressed through bilateral agreements whenever possible. CERCLA governs cleanup of American pollution in the United States, and Part 4 of the Environmental Management Act governs cleanup of Canadian pollution in British Columbia, but applying one country's statutes to conduct in the other's territory violates sovereignty and harms comity.

British Columbia also has an interest in this case because Teck is headquartered in Vancouver and has many operations throughout the province. As a significant contributor to the provincial economy and the development of its resources, Teck and its facilities benefit the people of British Columbia. British Columbia, therefore, would like

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particular situation, and general references to "American law" mean both federal and state law, whichever is applicable in a particular situation.

to ensure that Teck is treated fairly in assessing cleanup costs for pollution at the Columbia River site. If Teck – or, for that matter, any other British Columbia business in a position to directly or indirectly cause pollution across the U.S.-Canada border – is to be held responsible for cleanup costs in the United States, it is only fair that those cleanup costs be assessed in a manner that recognizes and accounts for the cross-border, international nature of the environmental contamination. Unilaterally applying the laws of one country without any sort of bilateral agreement fails to recognize that cross-border pollution is an international issue, and British Columbia strongly opposes this unilateral approach taken by the Court of Appeals.

In essence, British Columbia's interest in the petition is based on (1) the provincial government's significant role in environmental regulation within its borders and (2) British Columbia's view that businesses operating within the province and contributing to its economy – like Teck – should not be subject to private lawsuits in the United States under exclusively American law for conduct that took place entirely in Canada. Accordingly, British Columbia is filing this brief to make the following case to this Court: Whatever CERCLA's statutory structure, environmental regulation of discharge and cleanup of pollutants that cross the U.S.-Canada border in either direction should be addressed, wherever possible, through bilateral negotiation and agreements between the two countries, not private lawsuits in one country's courts.[4]

[4] Formal international negotiations are primarily a matter for the Canadian and American federal governments; under the Canadian Constitution, British Columbia, like American states, does not have treaty powers. *See* Can. Const. (Constitution Act, 1867) art. IX, § 132;

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STATEMENT OF THE CASE

The facts most important to this brief, which British Columbia wishes to emphasize, are as follows:

- Discharges from the Trail Smelter into the Columbia River have been regulated under British Columbia and Canadian law from the outset of the smelter's operations in the early 1900s. The discharge of slag was authorized in accordance with provincial regulations until 1995, when updated assessments of environmental impacts resulted in a prohibition against any further discharge of slag into the river. The provincial regulations were also updated to require reductions in the discharge of metals to the river, which was accomplished through upgrades in smelter technology and pollution control equipment.

- The Trail Smelter is located in British Columbia, and discharges of effluent from the smelter were released into the Columbia River well inside British Columbia, approximately ten miles upstream from the U.S.-Canada border. Such pollutants entered the United States by traveling down the Columbia River.

U.S. Const. art. I, § 8. Because the federal government of Canada is equipped to represent the interests of the provinces in these bilateral negotiations, British Columbia has a strong interest in ensuring that the Canadian federal government is able to continue representing the provinces' interests in bilateral negotiations with the United States. Furthermore, although not formal international treaties, British Columbia also often works with neighboring states to reach agreements on environmental matters that are local in nature. *See infra* § C; *infra* note 7; App. 4-33.

- If Respondents successfully brought a private CERCLA action against Teck, liability for the Columbia River cleanup would be unilaterally assessed under American law with no regard to the possibility of reaching an agreement between Teck, Canadian federal and provincial governments, and American federal, state, and tribal governments.

- The Canadian federal government has attempted to initiate discussions with the United States regarding the Columbia River cleanup, noting that while "Canada is opposed to enforcement of CERCLA against Teck . . . , a Canadian company operating in Canada," Teck "has offered to pay the costs of an investigation and remediation of the health and environmental risks attributable to its operations, but only under the terms of an international instrument and a binding commitment with the Canadian government." Letter from the Canadian Department of Foreign Affairs and International Trade to the U.S. Department of State, dated Nov. 23, 2004 (App. 1-3) (presented to the Court of Appeals in the Appendix to the Government of Canada's Amicus Curiae Brief).

ARGUMENT

The Court of Appeals disregarded the international and intergovernmental complexities inherent in transboundary pollution cases by unilaterally and exclusively applying American law to Teck, a Canadian company operating a smelter in British Columbia. The Court of Appeals' decision to apply American law without regard to

the fact that Teck's discharges occurred in British Columbia conflicts with long-established principles of international comity. Cross-border environmental issues should be addressed through bilateral negotiations and agreements, not unilateral application of one country's laws to conduct occurring in the other country's territory. This Court should grant Teck's petition in order to reestablish the importance of international comity in resolving cross-border disputes.

A. The United States and Canada, at both the federal and state/provincial levels, have different environmental regulatory schemes, but they share the same ultimate goals of protecting the environment while promoting economic development.

Canada and the United States are both industrialized, resource-rich countries, and they both have federal systems of government with constitutional divisions of power between the federal and state/provincial governments. Like the American federal and state governments, the Canadian federal and provincial governments all share the common goal of balancing environmental protection and resource preservation with economic growth and respect for private property rights. This is not an easy balance to manage, but it is important that any government seeking the best interests of its people make its best effort to manage this balance fairly and effectively.

The American federal and state governments employ various laws in their attempts to manage this difficult balance. One of these laws is CERCLA, which provides for, among other things, a private right of action against parties potentially liable for cleanup of polluted sites.

British Columbia does not quarrel with the United States' decision to enact CERCLA and create private litigation regarding environmental cleanup, so long as that litigation stays within the United States. Part 4 of the Environmental Management Act, like CERCLA, provides means to ensure cleanup of polluted sites within British Columbia, but, unlike CERCLA, it is enforced exclusively by the provincial government, not private litigation.

It is immaterial whether CERCLA or the Environmental Management Act represents the more effective framework for ensuring cleanup of polluted sites. All that matters is that the United States and Canada have chosen different ways of approaching this difficult and important issue – the United States enacted CERCLA, and Canada has left the matter largely to the provinces, leading to Part 4 of British Columbia's Environmental Management Act. Allowing Canada and the United States to manage their own environmental affairs is, of course, perfectly fair as long as the pollution remains in the jurisdiction whence it came. The problem, as in this case, arises when the pollution crosses an international border. The Court of Appeals chose to fall back on a technical reading of the CERCLA statute, willfully ignoring the implications of its unilateral cross-border application of American environmental law. This was error.

B. The Court of Appeals mistakenly treated Respondents' suit as "domestic" by narrowly focusing on the fact that the pollution currently lies on the American side of the border and neglecting to read CERCLA as part of a broader "constellation" of environmental regulation.

The Court of Appeals stated that its decision to reach across the U.S.-Canada border to apply CERCLA to a

Canadian company acting exclusively in British Columbia "is reinforced by considering CERCLA's place within the constellation of [American] environmental laws, and contrasting it with" the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*" Pet. App. at 21a (citing *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996)). The court continued, noting that "RCRA regulates the generation and disposal of hazardous waste, whereas CERCLA imposes liability to clean up a site when there are actual or threatened releases of hazardous substances into the environment." *Id.* at 21a-22a. In stating its view that extraterritorially applying CERCLA to acts within Canada was not, technically speaking, extraterritorial, the court observed that "it is the Canadian equivalent of RCRA, not CERCLA, that regulates how Teck disposes of its waste within Canada." *Id.* at 22a.

In effect, the Court of Appeals reasoned as follows:

- Remedial environmental cleanup laws, like CERCLA, exist in a separate universe from regulatory environmental discharge laws, like RCRA.
- Here, the discharge occurred in Canada, so it was governed by the Canadian or British Columbia equivalent of RCRA, but the cleanup must occur in the United States, so it is governed by CERCLA.
- Therefore, even though the discharge occurred north of the border, the fact that the cleanup area is entirely in the United States means that American law governs exclusively.

This reasoning might be *internally* logical, but it ignores the broader context of the environmental regulation field. In ignoring this broader context, the Court of Appeals mistakenly treats each individual environmental law – American or Canadian – as separate and distinct. But environmental laws should not be viewed this way, because they are designed to work together as part of a broader system of regulation. Indeed, the court itself referred to "CERCLA's place *within the constellation of . . . environmental laws*," Pet. App. at 21a (emphasis added), recognizing that CERCLA is merely one part of a broader federal and state regulatory scheme.

Viewed through the narrow, out-of-context prism of the Court of Appeals' reasoning, it is a simple matter to say: "This is a cleanup case, the cleanup area is in the United States, so it involves a domestic application of American law." And cleanup does in fact involve an application of domestic American law when the discharge is also governed by domestic American law. If, for example, the Trail Smelter were located just on the American side of the border, CERCLA could be applied as an integral part of "the constellation of environmental laws" applicable to the stretch of the Columbia River just south of the U.S.-Canada border (in this case, that "constellation" consists of a combination of U.S. federal and Washington state law). For a slightly more complicated, but still domestic, example, imagine that the Trail Smelter was along the Columbia River in southern Washington, and the cleanup site was on the Oregon side of the river. Federal law, including CERCLA, would apply in both states, but there could be a question of conflicting Washington and Oregon environmental law if Washington claimed the discharge was licensed, permitted, and legal, with Oregon insisting that

it was not. Even then, U.S. federal courts could conduct a conflict of laws analysis, determine which law would apply, and fairly decide the matter under established national rules.[5]

The important point here is that, when Congress enacted CERCLA – and when U.S. federal regulatory agencies and courts enforce CERCLA – Congress "consider[ed] CERCLA's place within the constellation of [American] environmental laws." Congress did *not* "consider[] CERCLA's place within the constellation of" American *and Canadian* environmental laws, which must be done in order to fairly and properly address cross-border pollution issues. The Court of Appeals failed to recognize this distinction when it decided to "domestically" apply one specific American statute to the cleanup of pollution discharged in British Columbia and regulated by Canadian federal and provincial law. Given its cross-border migration, the discharges from the Trail Smelter ought to be regulated by "the constellation of" American *and Canadian* environmental laws, and CERCLA should not have been applied exclusively and unilaterally to the Columbia River cleanup.

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[5] The same would be true if this were a dispute between two Canadian provinces regarding the applicability of one province's environmental law to a cleanup in or discharge from another province – the Supreme Court of Canada has the authority to resolve such conflict of laws matters. *See, e.g., Interprovincial Co-Operatives Ltd. v. The Queen in Right of Manitoba*, [1976] 1 S.C.R. 477 (Can.).

C. Considering principles of international comity, fairly and properly addressing cross-border pollution issues requires bilateral negotiation and agreements, not unilateral judicial action by one country's courts under one country's law.

The fundamental question presented by this case is not whether an American or Canadian facility near the border that causes pollution on the other side of the border may be required to assist with the cleanup of the polluted site; it is how to allocate responsibility and assess liability for cleanup costs.[6] Here, where a Canadian smelter polluted an American river, this Court must determine whether it is a matter properly resolved (1) in American courts under exclusively American law, which was the approach approved by the Court of Appeals, or (2) pursuant to bilateral negotiation and agreement, and possible reference to the International Joint Commission ("IJC"), which is the approach historically taken to cross-border pollution issues by Canada and the United States. The Court of Appeals effectively dismissed the significance of the U.S.-Canada border and applied American law. British Columbia asks this Court to instead favor bilateral solutions respecting the laws of both countries.

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[6] British Columbia does not dispute that, to the extent Teck is responsible for polluting the Columbia River, it may be required to contribute to the cleanup costs. *See* Boundary Waters Treaty, cited *infra*, art. IV ("It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."); *Restatement (Third) of Foreign Relations Law* § 601(1)(b) ("A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control . . . are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.").

As explained in the petition, Canada and the United States share a long history of working together to cooperatively resolve border issues, including cross-border pollution. *See* Pet. at 10-12. British Columbia also has a strong record of working with neighboring American states to address and resolve environmental issues. *See, e.g.*, Environmental Cooperation Agreement Between the Province of British Columbia and the State of Washington (May 7, 1992) (App. 4-9); Memorandum of Understanding Between the Washington Department of Ecology & the British Columbia Ministry of Environment, Land, & Parks (April 12, 1996) (App. 10-15); Interagency Memorandum of Understanding Between the State of Washington, Department of Ecology and the Province of British Columbia, Ministry of Environment, Land and Parks (applying the 1992 Environmental Cooperation Agreement to the Columbia River) (App. 16-22); Memorandum of Understanding Between the Washington State Department of Ecology and the British Columbia Environmental Assessment Office (June 20, 2001) (App. 23-29); Environmental Cooperation Arrangement Between the Province of British Columbia and the State of Idaho (September 14, 2003) (App. 30-31); Environmental Cooperation Arrangement Between the Province of British Columbia and the State of Montana (September 14, 2003) (App. 32-33); Memorandum of Understanding Between the Idaho Department of Environmental Quality and the British Columbia Ministry of Water, Land and Air Protection (App. 34-37).[7] Resolving

[7] Since neither Canadian provinces nor American states have the power to enter into treaties, *see supra* note 4, these types of state-provincial accords are limited to "agreements" and "memorandums of understanding" that do not have the full force to international treaties. That said, these state-provincial environmental agreements and

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these issues through bilateral negotiation and agreement is important because it is the only method that ensures the resolution considers both American and Canadian environmental law and practice. While each country can and should apply its own law when regulating discharge and cleanup of domestic pollution, cross-border pollution must be addressed taking into account both countries' regulatory systems.

Since the United States and Canada share a history of bilateral solutions, there is no need to start from scratch in fashioning an agreement for cleanup of the Columbia River site. The 1909 Boundary Waters Treaty between the United States and Great Britain (on behalf of Canada), which established the IJC to address border disagreements, should govern. *See* Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448 ("Boundary Waters Treaty"). If the United States and Canada are unable to resolve the dispute through bilateral negotiation, either country may, under the treaty, refer "matters of difference . . . involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the [U.S.-Canada border] . . . to the International Joint Commission ["IJC"] for examination and report. . . ." Boundary Waters Treaty, art. IX. If the two countries are unable to reach an agreement based on the IJC's Article IX report, the countries may agree to have the IJC issue a binding decision. *See id.* art. X. As such, this treaty "specifically

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memorandums reflect British Columbia's ability and desire to discuss and enter into agreements with its neighboring states to address cross-border environmental issues.

provides a remedy for resolving these types of transboundary water pollution disagreements." Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. Rev. 363, 414 (2005); *see also id.* at 415-20 (discussing the application of the Boundary Waters Treaty to cross-border pollution issues).[8] Indeed, the United States and Canada have even used the Boundary Waters Treaty to resolve a dispute regarding air pollution from the very same facility at issue here, the Trail Smelter, that began during the 1920s and was finally resolved by a special arbitration tribunal in 1941. *See id.* at 420-23.[9]

It is remarkable that the Court of Appeals decided to apply exclusively American law to this cross-border pollution case without even citing the Boundary Waters Treaty, especially given that the Boundary Waters Treaty, like all treaties, is part of "the supreme law of the land" in the United States. U.S. Const. art. VI, cl. 2. And constitutionally-binding treaties aside, this Court has historically held

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[8] Professor Parrish also notes that "Canada has long been concerned that Teck Cominco's Trail Smelter operations were violating Canada's obligations under the Boundary Waters Treaty." Parrish, *supra*, at 414 n.264. As stated, British Columbia does not seek to absolve Teck of all responsibility for pollution at the Columbia River site; rather, the province seeks to ensure that, if Teck is to be assessed liability for cleanup costs, it be done by bilateral agreement or application of treaty law, not unilateral, cross-border application of American law.

[9] The final decision in the "Trail Smelter Arbitration" has been called "by far the 'most influential decision on transboundary pollution in international law.'" Parrish, *supra*, at 420 (quoting Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 Duke L.J. 931, 947 (1997)).

that principles of international comity and respect for the law of nations are presumptively binding on all laws passed by Congress. *See, e.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . .") (op. per Marshall, C.J.), *quoted by McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963), and *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178 n.35 (1993).

In *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), this Court discussed and further developed these principles in declining to apply the Labor Management Relations Act to foreign seamen on a foreign ship while in an American port. This Court stated that the judiciary is ill-suited to wade into international affairs where not clearly directed to do so:

> For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and relative action so certain.

Id. at 147. That same reasoning should apply to this case. Congress enacted CERCLA as part of what the Court of Appeals called the United States' "constellation of environmental laws," Pet. App. at 21a, and it functions perfectly well within that constellation. But whatever the Court of Appeals' technical reading of terms like "arrangers" and "releases," there is no evidence that Congress intended CERCLA to reach across the U.S.-Canada border and undermine the bilateral approach to cross-border

pollution historically followed by Canada and the United States.

The Court of Appeals' decision recklessly ran "interference in . . . a delicate field of international relations" without "the affirmative intention of the Congress clearly expressed." Without any evidence of clear Congressional intent, the Court of Appeals should have respected principles of international comity and allowed the United States and Canada to address the cross-border Columbia River cleanup issue bilaterally.

D. Application of CERCLA to conduct within British Columbia interferes with the province's environmental regulation scheme and would be unfair.

The application of American law by U.S. courts to discharges from the Trail Smelter into the Columbia River would not be an isolated instance, limited to that specific facility and that specific activity. There is nothing in the Court of Appeals' opinion that would preclude the application of American law to thousands of other entities whose activities take place entirely within British Columbia and are subject to provincial regulation.

The interference of the Court of Appeals' decision with British Columbia's environmental regulation scheme can be illustrated by considering one of the differences between Part 4 of British Columbia's Environmental Management Act and CERCLA. CERCLA, like many U.S. environmental statutes, contains a parallel enforcement mechanism whereby "private attorneys general" can file citizens suits such as the instant case so as to enforce regulations, permits, and orders. *See* 42 U.S.C. § 9659(a).

To incentivize such private enforcement, prevailing plaintiffs are entitled to an award of attorneys' fees and costs. *See id.* § 9659(f). At the same time, such private actions are somewhat constrained by the requirements that they must provide 60-day advance notice of the suit to the federal and affected state governments, *see id.* § 9659(d)(1), no action may be commenced if the United States is already "diligently prosecuting" an enforcement action, *see id.* § 9659(d)(2), and the United States and the affected state may intervene in any action as of right, *see id.* § 9659(g).

British Columbia's Environmental Management Act has no similar provision. Rather, it has long been the province's statutory and administrative policy to use formal enforcement actions as a last resort, preferring to devote the resources that would be consumed in litigation to voluntary cleanup agreements and other remedial mechanisms. For that reason, a citizen suit provision is antithetical to the province's environmental policy, because it substitutes time-intensive and costly formal litigation for other enforcement mechanisms that, in the province's considered judgment, are more cost effective. Under the Court of Appeals' decision, individual U.S. citizens would have private attorney general rights against Canadian entities operating in British Columbia, rights Canadian citizens who may be equally affected by the same pollution would not have.

Moreover, since neither British Columbia nor the federal government of Canada enjoy any of the notice, diligent prosecution, or intervention rights afforded their American regulatory counterparts under CERCLA, the delicate balance envisioned in CERCLA between private attorneys general and overseeing agencies would be upset.

A Canadian province that has consciously chosen to take a different regulatory path than the United States would be subject to a more extreme exposure to private oversight, with its attendant contentiousness and attorneys-fees disputes, than U.S. jurisdictions would be subject to. This is an affront to longstanding principles of comity and bilateral resolution of transboundary issues.

As another example of the consequences of the Court of Appeals' decision, under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, the difficult problem of cross-border air pollution is expressly recognized and managed through a program of respect and reciprocity at the highest levels of government, *see id.* § 7415, a program that has served both countries well. Yet, because a CERCLA "facility" can be created through deposits of pollutants carried by wind as easily as by water, the Court of Appeals' decision would authorize private U.S. citizens to effectively second-guess in U.S. courts the range of measures taken pursuant to the Clean Air Act, a result clearly not envisioned by Congress in enacting either the Clean Air Act or CERCLA.

The potential impact of the Court of Appeals' decision within Canada, and on international law, has already been recognized by commentators:

> In *Pakootas v. Teck*, the Court of Appeals for the Ninth Circuit issued a stark decision that provides for the extra-territorial application of U.S. domestic law, and raises far more questions than it answers. If the decision stands, it will have a fundamental impact on the development of international environmental law. . . . Further, the decision interferes in the operation of Canadian law and creates uncertainty in its application to Canadian facilities.

John C. Turchin & Risa Schwartz, *Beyond Trail Smelter: Assessing the Changes in International Environmental Law, in Environmental Law: The Year in Review 2006* 105, 106 & 124 (Stanley D. Berger & Dianne Saxe eds., 2007).

The Court of Appeals' decision, if it stands, will have broad impact on environmental regulation within British Columbia and on the relationship between the Canadian and American federal and provincial/state governments addressing cross-border environmental issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRIAN W. GRIMM
Counsel of Record
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U.S. Bank Centre
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Counsel for Amicus Curiae
Her Majesty the Queen in Right
of the Province of British Columbia

May 2, 2007

Department of Foreign Affairs and International Trade

Ministère des Affaires éntrangères et du Commerce International

125 Sussex Drive
Ottawa, Ontario
KIA 0G2

November 23, 2004

NUE-0118

Mr. Terry A. Breese
Director,
Office of Canadian Affairs
United States Department of State

Dear ~~Mr. Breese~~: Terry

Thank you for your letter of September 14, 2004, regarding contamination in Lake Roosevelt in the upper Columbia River in Washington State. We appreciate the willingness of the United States to solve this matter through a bilateral agreement and we are committed to its development, to resolve the contamination in the region, in order to protect human health and the environment.

As you will recall from our meeting on February 28, 2004, Canada was to develop a proposal as an alternative to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). In March, we sent to you the proposed MOU "Respecting the Investigation of Contamination in the Upper Columbia River/Lake Roosevelt Area". Our proposal was designed to investigate conditions in Lake Roosevelt, to assess the risks to the

environment and human health, as a priority, and to a develop a remediation plan.

This joint approach was intended to provide science-based outcomes, public participation, access to information and timely decisions. We appreciate your obligations to Native Americans and the interests of the State of Washington, as mentioned in your letter and expect that they would have an enhanced consultative role in the development and implementation of the proposed MOU.

As noted in our January 8, 2004 diplomatic note, Canada is opposed to enforcement of CERCLA against Teck Cominco Metals Ltd., a Canadian company operating in Canada. The company has offered to pay the costs of an investigation and remediation of the health and environmental risks attributable to its operations, but only under the terms of an international instrument and a binding commitment with the Canadian government.

We appreciate the offer in your letter to consult with Canada and share information on EPA's on-going RI/FS investigation. However, Canadian officials are not prepared to be subject to CERCLA, the US statute. Under our proposed MOU, decisions on the investigation into conditions in Lake Roosevelt and remediation would be made jointly by US and Canadian experts, on the basis of consensus and outside of the ambit of CERCLA. In transmitting our proposed MOU, we also indicated an interest in referring the matter to the International Joint Commission, for an independent, scientific assessment and we continue to be interested in this possible option.

We remain concerned that this unilateral decision by EPA to proceed under CERCLA may lead to other environmental liability cases being launched in both countries.

I look forward to the opportunity to discuss a mutually acceptable agreement, in the long tradition of the two governments working cooperatively to solve transboundary environmental issues. Thank you for your attention to this important issue and we would be pleased to meet to discuss its resolution at your convenience.

Sincerely,

/s/ Bruce Levy
Bruce Levy
Director,
United States Relations Division

Environmental Cooperation Agreement
Between the Province of British Columbia
and The State of Washington

WHEREAS the Province of British Columbia and the State of Washington are committed to ensuring a consistent and high-level of environmental quality for their citizens; and

WHEREAS environmental concerns and impacts respect neither physical or political boundaries, and both governments recognize the necessity for joint action on issues of mutual interest; and

WHEREAS the Ministries of the Province and the Executive Departments of Washington wish to share information and to cooperate on environmental matters, are prepared to work together with respect to their responsibilities, and wish to enter into specific cooperation arrangements; and

WHEREAS the increased complexity of environmental issues, particularly their interjurisdictional impacts, requires coordinated responses from both governments;

NOW, THEREFORE, the Province of British Columbia and the State of Washington agree to establish a **British Columbia/Washington Environmental Initiative** to promote and coordinate mutual efforts to ensure the protection, preservation and enhancement of our shared environment for the benefit of current and future generations;

The parties also agree to develop an action plan, which shall form part of these efforts, reflecting mutual priorities and to enter into specific arrangements necessary to address environmental problems.

DATED AT Olympia Washington,
United States of America
This 7th day of May, AD 1992.

/s/ Mike Harcourt
Mike Harcourt, Premier
Province of
British Columbia

/s/ Booth Gardner
Booth Gardner, Governor
State of Washington

BRITISH COLUMBIA/WASHINGTON ENVIRONMENTAL INITIATIVE

Terms of Reference

Mandate/Purpose:

The Initiative's mandate is derived from the Environmental Cooperation Agreement between the two jurisdictions entered into in May 1992. The Initiative's purpose is to ensure coordinated action and information-sharing on environmental matters of mutual concern.

Members: Deputy Minister, BC Environment, Lands and Parks

Director, Washington Department of Ecology

Observers: Regional Director General, Pacific and Yukon Region, Environment Canada

Administrator, Region 10, US Environmental Protection Agency

Support:

Administrative support will be provided by BC Environment, Lands and Parks and the Washington Department of Ecology who will be jointly responsible to prepare agendas, ensure appropriate attendance at Initiative meetings and coordinate follow-up action.

Procedures:

- The Initiative will generally meet twice each year, or as necessary.
- The Initiative may establish sub-committees to deal with specific matters.
- The Initiative may, by formal agreement, establish Task Forces to address issues of special or major significance.
- An Annual Report will be made to the Premier of British Columbia and the Governor of Washington.

BRITISH COLUMBIA/WASHINGTON ENVIRONMENTAL INITIATIVE

Preliminary Action Plan/Work Priorities

British Columbia and Washington's commitment to cooperative efforts on environmental matters has resulted in the identification of the following priority issues for action:

1. Georgia Basin/Puget Sound Water Quality Initiative

   Georgia Basin/Puget Sound water quality is considered to be a **high priority issue** and requires immediate joint attention.

   Concerted efforts are underway by both governments to identify and remedy pollution problems in the Georgia Basin and Puget Sound. Coordination of these programs will enhance their environmental benefits.

2. Columbia River/Lake Roosevelt Water Quality

Columbia River/Lake Roosevelt Water Quality is considered to be a **high priority issue** by both parties and requires immediate joint attention.

A task force involving affected interest groups will examine the issues and ensure necessary action is taken to control sources and protect water quality.

3. Nooksack River Flooding

Nooksack River flooding is considered to be a **high priority issue** and requires continued joint attention.

Recent flooding in Washington's Nooksack River resulted in flooding in British Columbia's West Sumas area. Continued attention is needed to ensure implementation of the recommendations of a Task Force that identified actions needed to avert recurrence of such problems.

4. Regional Air Quality Management

Regional air quality management is considered to be a **high priority issue** in the Georgia Basin/Puget Sound airshed and requires timely joint attention.

Issues such as transboundary flows of sulphur dioxide, nitrogen oxides and volatile organic compounds should be addressed in an integrated manner through regional implementation of the Canada/U.S. Air Quality Agreement.

5. Coordinated Groundwater Management (Sumas-Abbotsford)

Management of the groundwater in the Sumas-Abbotsford area is considered to be a **high priority issue** and requires immediate joint attention.

The aquifers are of particular concern as a result of domestic use on both sides of the border. Improved co-ordination of the activities of all parties to address both groundwater quantity and quality will encourage more effective resolution.

6. Solid, Hazardous and Biomedical Waste Cooperation

Waste management is considered to be an **emerging issue** and should be the subject of information exchange and further discussion. The transboundary impacts of waste management practices and contaminated sites should be examined through mechanisms such as the Memorandum of Understanding on Hazardous Waste Management.

7. Water Resource Management

Water management in general is considered to be an **emerging issue** and should be the subject of information exchange and further discussion.

Increased water use in response to growing needs necessitates protection of instream flows; this requires sound data and thorough field investigations. Joint efforts can ensure efficiency and maximum productivity for both governments.

8. Wetlands Protection

The protection of wetlands and wildlife habitat is considered to be an **issue of ongoing interest** to both parties. The exchange of information on wetland and habitat protection programs will form the basis for initial cooperation on this issue.

9. Other Issues

The parties agree to use the Initiative to identify and address issues of concern, and will assist each other in dealing with the agencies and departments of their

respective governments. Potential issues for discussion include: earthquake and emergency preparedness and State of Environment reporting.

Province of British Columbia

The State of Washington

British Columbia/Washington Environmental Cooperation Council

May 3, 1996

TO: Premier Glen Clark
Governor Mike Lowry

FROM: Thomas Gunton, Deputy Minister, Ministry of Environment, Lands and Parks
Mary Riveland, Director, Department of Ecology

SUBJ: Memorandum of Understanding on Environmental Cooperation

In accordance with the 1992 Environmental Cooperation Agreement between the state and the province, our agencies have been working together for the past 4 years to resolve and avoid cross-border problems. We have recognized that environmental needs do not respect political borders and that effective protection of our resources and residents requires shared programs and regular communication.

We have developed effective joint efforts to address Puget Sound and Georgia Basin water quality, to reduce pollution and respond to spills in the Columbia River, to regulate air pollution sources in the border region, to reduce flooding problems in the Nooksack River and to protect the ground water in the Abbotsford/Sumas area.

To promote continuation of these activities and to maximize our efficiency and effectiveness, we have completed

a formal Memorandum of Understanding between our agencies. We see this document as a framework that will aid in the implementation of the 1992 Environmental Cooperation Agreement and serve as a link among subject-specific agreements. Such agreements have already been developed on air quality management and protection of the Columbia River; these will become appendices to this Master MOU.

We are forwarding a copy of the Memorandum of Understanding because we hope you will share our sense of accomplishment in building a transboundary partnership that increases each jurisdiction's capacities and constructively avoids or resolves common problems. A copy of this message and the Memorandum of Understanding are being sent to the Honourable Moe Sihota, Minister of Environment, Lands and Parks, for his information.

Enclosure

cc Honourable Moe Sihota

MEMORANDUM OF UNDERSTANDING BETWEEN THE WASHINGTON DEPARTMENT OF ECOLOGY AND THE B.C. MINISTRY OF ENVIRONMENT, LANDS & PARKS

I. Purpose and Scope

In 1992, the Governor of Washington and Premier of British Columbia signed an Environmental Cooperation Agreement committing the two jurisdictions to "promote and coordinate mutual efforts to ensure the protection, preservation and enhancement of our shared environment for the benefit of current and future generations." The

Agreement went on to authorize the state and province to "enter into specific arrangements necessary to address environmental problems." It designated the Washington Department of Ecology (hereafter Ecology) and the British Columbia Ministry of Environment, Lands and Parks (hereafter the Ministry) as the agencies responsible for implementation. For purposes of this Memorandum of Understanding (MOU), those agencies shall be deemed the Lead Agencies.

The Ministry and Ecology have established Task Forces and created other mechanisms for joint efforts. This MOU describes approaches to addressing transboundary environmental issues that can be used by any of the Task Forces or by the Lead Agencies when no task force exists.

This "Umbrella" MOU is designed to be general, with the recognition that subject-specific Memoranda can be adopted as Appendices if the Lead Agencies jointly agree to do so.

II. Responsibilities

The Department of Ecology is Washington's main environmental protection agency, with lead responsibility for air and water pollution control, hazardous waste management, coastal and shoreline protection, water resources allocation, toxic site cleanup, and technical and financial assistance to local governments for environmental protection. The Department's mission is to protect, preserve, and enhance Washington's environment and promote the wise management of our air, land and water for the benefit of current and future generations.

The mandate of the British Columbia Ministry of Environment, Lands and Parks is to protect the clean air, fresh water and productive land in the province, and to nurture the abundance of natural areas, wildlife and scenic beauty. To that end, the Ministry is responsible for controlling or managing toxic, solid and liquid wastes, establishing and operating a network of protected areas, managing the use and disposition of publicly owned lands, and managing freshwater fisheries and wildlife.

III. Provisions

The Ministry and Ecology wish to maximize efficiency and effectiveness and to cooperate in a spirit of partnership. Toward this end, they agree to make every effort to share information, consult with one another, and coordinate their work on environmental issues that affect resources and residents in the border region.

In particular, the agencies commit to:

- designate lead liaisons for cross-border communications to serve as central points of contact on issues related to the Environmental Cooperation Agreement on this MOU;
- upon request by the other jurisdiction, establish communications among staff members working on issues with cross-border impacts to enable open sharing of information and awareness of processes for public review and comment;
- provide referrals to other agencies within the state and province when an issue needing resolution does not fall within the responsibilities of the lead agency; and

- establish working relationships with regional representatives of federal agencies to facilitate cooperation on appropriate issues.

In accordance with implementing appendices developed by the Lead Agencies, the state and province will:

- exchange draft permits on proposed major projects that could have cross-border impacts;
- include the regional office of the other jurisdiction in the distribution of environmental assessments for major projects within x kilometers (y miles) of the border;
- develop early notification procedures to identify problems or sources of controversy to residents or government agencies in the border region;
- establish procedures to cooperatively respond to emergencies that could cause environmental harm or damages; and
- cooperate in the development of environmental information, including education, training and technical support.

Implementing appendices may include other parties if the Lead Agencies determine that this will be beneficial.

IV. Dispute Resolution

In the spirit of partnership and the efficient use of public resources, the parties agree to attempt to resolve disputes or conflicts at the lowest possible staff level. Issues will be elevated to more senior management levels within each agency as needed to achieve resolution. The mutual goal shall be to ensure the rapid resolution of disagreements

before negative impacts on the environment or economy occur.

V. Terms of this Memorandum of Understanding

This agreement shall be effective when signed by both parties. It may be amended at any time by agreement between the parties and may be terminated by either party upon 30 days written notice to the other.

IN WITNESS OF THE AGREEMENT TO ADHERE TO THE TERMS OF THIS MEMORANDUM OF UNDERSTANDING, the parties have executed it by their signatures:

/s/ Tom Gunton	/s/ Mary Riveland
Tom Gunton Deputy Minister, B.C. Ministry of Environment, Lands and Parks	Mary Riveland Director, Washington Department of Ecology
96/4/12 Date	4/10/96 Date

INTERAGENCY MEMORANDUM OF UNDERSTANDING BETWEEN THE STATE OF WASHINGTON DEPARTMENT OF ECOLOGY EASTERN REGIONAL OFFICE

AND

THE PROVINCE OF BRITISH COLUMBIA MINISTRY OF ENVIRONMENT, LANDS AND PARKS KOOTENAY REGION

This two party agreement is made and entered into by and among the Department of Ecology, hereinafter referred to as "Ecology" and the Ministry of Environment, Lands and Parks, hereinafter referred to as "BC Environment."

Whereas, the Environmental Cooperation Agreement of May 7, 1992 between the Province of British Columbia and the State of Washington, mandated coordinated action and information sharing between the State and the Province on environmental matters of mutual concern and the establishment of Task Forces to address issues of major environmental significance.

Whereas, environmental pollutants in the international boundary portion of the Columbia River drainage can travel across the border and may be a source of concern to the parties to this MOU and area residents,

Whereas, Ecology and B.C. Environment are parties to a formal Memorandum of Understanding regarding information sharing on air emission sources (April 14, 1994).

Whereas, the Lake Roosevelt Water Quality Council which provided a forum for Ecology and B.C. Environment to cooperate on water quality issues related to Lake Roosevelt

and the Upper [Lower] Columbia River ceased operation in September, 1995 as a planning and coordinating body.

Whereas, at the June 9, 1995 meeting of the British Columbia/Washington Environmental Cooperation Council, B. C. Environment and Ecology managers were directed to prepare a Memorandum of Understanding to assure continued coordination and cooperation relative to major environmental issues within the international portion of the Columbia River drainage.

Whereas, the regulatory/oversight responsibilities over waste discharges rests primarily with Ecology and B.C. Environment as the regulatory agencies of the State and the Province.

Therefore, B. C. Environment and Ecology hereby enter into this Memorandum of Understanding, hereafter called the MOU.

This MOU incorporates by reference the four party MOU on Air Quality between the State of Washington Department of Ecology, The State of Washington Northwest Air Pollution Authority, The Province of British Columbia Ministry of Environment, Lands and Parks, and The Greater Vancouver Regional District, as it applies to this portion of the Columbia River drainage.

B. C. ENVIRONMENT AND ECOLOGY, MUTUALLY AGREE TO:

- in accordance with section III a) of attachment 1, provide timely prior notification of proposed discharges to the water or land which have significant potential for cross boundary water quality impacts.

- in accordance with section III b) of attachment 1, provide timely prior notification of proposed significant consumptive water use.
- in accordance with section III c) of attachment 1, provide an opportunity for comment on planning activities that may have trans-boundary impacts.
- in accordance with section III d) of attachment 1, provide timely notification of significant spills to the Columbia River including tributary streams.
- in accordance with section III e) of attachment 1, share air and water quality monitoring data.
- in accordance with section III f) of attachment 1, provide the opportunity for trans-boundary public comment on proposals under consideration by the agency with jurisdiction.
- in accordance with section III f) of attachment 1, jointly facilitate public information sharing meeting upon mutual agreement of need.
- specify appropriate contacts within each agency to facilitate timely sharing of information.

Statutory Powers

Nothing in this Memorandum of Understanding shall be construed as affecting or limiting the legislative or statutory powers of the signatories to this memorandum.

Termination

The period of performance of this MOU shall commence on the date it is signed by both parties and remains in effect until terminated by either or both of the parties by way of 30 days prior written notification.

IN WITNESS THEREOF, the parties execute this agreement.

Province of British Columbia Ministry of Environment, Lands, and Parks	State of Washington Department of Ecology
/s/ Dennis G. McDonald	/s/ Claude W. Sappington
Dennis G. McDonald Regional Director Kootenay Region	Claude W. Sappington Regional Director Eastern Region

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ATTACHMENT 1

SCOPE OF WORK

PRIOR CONSULTATION AND INFORMATION SHARING

ON

ENVIRONMENTAL ISSUES

I. Coordination and Cooperation

Air and water quality are issues of mutual concern to both parties in this agreement. Because point and nonpoint sources of contamination on one side of the international boundary have the potential to impact environmental quality on the other side, it is imperative that regulatory agencies in both Washington and British Columbia coordinate their regulatory actions and cooperate in sharing relevant environmental quality information necessary to ensure environmental protection as provided by both jurisdictions. To this end, this MOU is entered into by the agencies on both sides of the border with the most direct regulatory impact on cross-boundary environmental quality issues. These are the British Columbia Ministry of Environment, Lands and Parks and Washington

State Department of Ecology. This MOU addresses the roles and responsibilities of these agencies in consulting with each other early in the application process concerning significant environmental permits, licenses, monitoring and planning activities.

II. Geographic Area of the Scope of Work

The area of work encompasses the international portion of the Columbia River drainage defined as the main stem Columbia River between Grand Coulee Dam and Hugh Keenleyside Dam and the Pend Oreille River within Washington State and British Columbia.

III. Elements of Prior Consultation and Information Sharing

There shall be prior consultation and information sharing concerning environmental activities between B. C. Environment, Kootenay Regional Office (Nelson) and Ecology, Eastern Regional Office (Spokane) as follows:

a) Wastewater Discharges/permits – At least thirty (30) days prior to the issuance, re-issuance of a permit, or significant modification (significant being defined in accordance with normal business practices followed by the regulating agency) of an existing waste discharge permit that may affect the international portion of the Columbia River drainage, the parties will submit a complete application package to each other for review and comment. The permitting agency shall provide a copy of the final permit and upon request, the Responsiveness Summary (technical report) of the reviewing agency. Discharges of effluent to ground that may adversely affect the

cross boundary surface or ground water quality shall also be included in the review and consultation process.

b) Consumptive Use of Water – at least thirty (30) days prior to the issuance of significant (in excess of 10 cfs) permanent consumptive water rights that could effect [sic] cross border stream flow, the permitting agency shall provide application information to the reviewing agency for comment. The final decision will be copied to the reviewing agency.

c) Water Drainage Basin Planning – From time to time, water drainage basin planning activities may be contemplated for a basin located within the geographic area of this MOU. If in the opinion of the planning agency there will be cross-boundary impacts, the jurisdiction affected by the planning activities or decisions will be offered the opportunity to review and participate in the planning process.

d) Emergency Spill Response – In addition to formal notification procedures, Ecology and B. C. Environment will continue informal early notification of spills to the international portion of the Columbia River drainage.

e) Data Exchange – Upon request, all available environmental data from the international portion of the Columbia River drainage within the possession of either party to this agreement will be shared between the agencies.

f) Public Involvement – Either agency may have the lead responsibility for approving environmentally significant projects or activities that have the potential to cause cross border impacts. Upon the request of either B.C. Environment or

Ecology, the public within the geographic area of this agreement, will be given the opportunity to review and comment in writing or verbally on a proposal under consideration by the agency with jurisdiction. B. C. Environment and Ecology agree to jointly facilitate public information sharing meetings as the need arises. The location of these meetings will alternate between British Columbia and Washington State.

MEMORANDUM OF UNDERSTANDING BETWEEN THE WASHINGTON STATE DEPARTMENT OF ECOLOGY AND THE BRITISH COLUMBIA ENVIRONMENTAL ASSESSMENT OFFICE

WHEREAS

A. The Environmental Cooperation Agreement of May 7, 1992 between the Province of British Columbia and the State of Washington directed the parties to coordinated [sic] action and information sharing between the Province and the State on environmental matters of mutual concern;

B. The Memorandum of Understanding of April 1996, between the Department of Ecology (Ecology) and the British Columbia Ministry of Environment Lands and Parks (MELP) committed the Province and the State to make efforts to share information, consult with one another, and coordinate their work on environmental issues that affect resources and residents in the border region, and to include the regional office of the other jurisdiction in the distribution of environmental assessments for certain major projects;

C. The State of Washington and the Province of British Columbia recognize each other's authority and responsibilities to conduct or require, where appropriate, an environmental assessment/environmental review (EA/ER) of project proposals within their jurisdiction;

D. The State of Washington and the Province of British Columbia each have established processes for the EA/ER of certain projects within their respective jurisdictions;

E. The Province of British Columbia, as represented by the Environmental Assessment Office (EAO), and the State of Washington, as represented by Ecology, support a Memorandum of Understanding between the parties specific to inter-jurisdictional cooperation on information sharing about the practice of EA/ER in each jurisdiction, and notification and information exchange related to major project proposals in the vicinity of the other jurisdiction;

F. In the State of Washington, Ecology is a lead agency for the EA/ER of some major projects; however, EAs/ERs may be led by another state agency or a local government authority, and Ecology does not coordinate EAs/ERs led by another agency or a local government authority;

G. In the Province of British Columbia, the EAO directs the EA/ER of major projects.

THEREFORE, EAO AND ECOLOGY MUTUALLY UNDERTAKE AS FOLLOWS

IT IS THE PURPOSE OF THIS MEMORANDUM OF UNDERSTANDING (MOU) TO:

1. Facilitate information sharing and mutual understanding of the EA/ER laws, policies and processes of each jurisdiction and facilitate full knowledge of changes; and

2. Facilitate notification and information exchange regarding major project proposals that are in the vicinity of the other jurisdiction.

THIS MOU APPLIES TO THE FOLLOWING MAJOR PROJECTS THAT ARE IN THE VICINITY OF THE OTHER JURISDICTION:

1. A major project proposal in British Columbia is considered to be in the vicinity of the State of Washington if it is located 100 kilometres or less from the border between the two jurisdictions;

2. A major project proposal in the State of Washington is considered to be in the vicinity of British Columbia if it is located in any of the following counties within the State of Washington: Clallam, Jefferson, San Juan, Island, Whatcom, Skagit, Chelan, Okanogan, Ferry, Stevens and Pend Oreille.

IT IS MUTUALLY AGREED THAT:

1. Definitions

IN THIS MEMORANDUM OF UNDERSTANDING (MOU)

1.1 "major project" means, for a project located in British Columbia, a reviewable project as defined in section 1 of the British Columbia *Environmental Assessment Act* (EA Act), and for a project located in Washington State, a project subject to state jurisdiction under the *State Environmental Policy Act* (SEPA) for which a Determination of Significance has been made thereby requiring an environmental impact statement;

1.2 "parties" means the State of Washington represented by the Department of Ecology (Ecology) and the Province of British Columbia represented by the Environmental Assessment Office (EAO).

2. Mutual Understanding of the EA/ER Laws, Policies and Processes

2.1 Each party will provide the other with information on its EA/ER process for major projects

within its jurisdiction to facilitate mutual understanding of the EA/ER laws, policies and processes of each jurisdiction;

2.2 Each party will provide the other with information in a timely manner on any changes to the EA/ER laws, policies and processes of its jurisdiction that may affect the other jurisdiction.

3. Notification of Major Project Proposals and Information Exchange

3.1 Each party will provide notification to the other party of major project proposals that are in the vicinity of the other jurisdiction as follows:

(i) Ecology will provide notification about major project proposals that are in the vicinity of British Columbia by:

- on a weekly basis, forwarding to the EAO a list of all project proposals that are located in the vicinity of British Columbia for which a Determination of Significance/Scoping Notice has been issued; and
- posting information on the SEPA Register on Ecology's website in a form that is specifically sorted to identify projects that are located in the vicinity of British Columbia; and
- when Ecology is the lead agency for the proposal, providing written notice to the EAO as early as possible but no later than the time when a Determination of Significance/Scoping Notice is issued;

(ii) EAO will provide notification about major project proposals that are in the vicinity of the State of Washington by:

- providing written notice to Ecology as early as possible in the EA/ER process, but no later than seven (7) days following receipt by the EAO of copies of an accepted application for a project approval certificate, and
- ensuring information about major project proposals in the vicinity of Washington State is posted on the EAO website;

3.2 Each party will provide information on the EA/ER of a major project proposal in its jurisdiction, including information on opportunities to provide comment on the proposal, upon request from the other party;

3.3 The parties will work together to develop mechanisms for notifying and consulting with members of the public who may have an interest in a major project proposal;

4. Consideration of Comments

4.1 Each party will consider any comments received from the other jurisdiction about the potential effects of a major project proposal that is in the vicinity of the other jurisdiction prior to making any decisions regarding project approval;

4.2 For a major project proposal located in Washington State, comments will be submitted directly to the designated lead agency for the EA/ER of that proposal;

4.3 For a major project proposal located in British Columbia, comments will be submitted directly to the EAO.

5. Coordination with Other Arrangements

5.1 In implementing this MOU, existing bilateral arrangements related to joint management of the shared environment will be considered in order to support coordination and consistency with those other arrangements.

6. Dispute Resolution

6.1 In the spirit of cooperation and the efficient use of public resources, the parties will make reasonable efforts to resolve disputes arising in relation to this MOU at the lowest possible staff level through implementation planning, cooperation and consultation. Issues will be elevated to more senior management levels within each jurisdiction as needed to achieve timely resolution;

6.2 In the event of a dispute arising in relation to the technical aspects of the EA/ER of a specific major project, the parties will inform senior management levels in a timely manner and obtain direction on resolving the dispute.

7. Administration

7.1 The parties may continue existing administrative arrangements or enter into new administrative arrangements in order to implement their commitments under this MOU.

8. Term of this MOU

8.1 This MOU shall be effective when signed by both parties. It may be amended at any time by concurrence of the parties and may also be terminated by either party upon thirty (30) days written notice to the other.

Dated at Bellingham, WA
This 20 day of June, 2001

/s/ Sheila Wynn
Dr. Sheila Wynn
Deputy Minister and
Executive Director
British Columbia Environmental
Assessment Office

Dated at Bellingham, WA
This 20 day of June, 2001

/s/ Thomas Fitzsimmons
Thomas Fitzsimmons
Director
Washington State
Department of
Ecology

Province of
British Columbia

State of
Idaho

ENVIRONMENTAL COOPERATION ARRANGEMENT

Between the Province of
British Columbia and the State of Idaho

WHEREAS the Province of British Columbia and the State of Idaho are committed to ensuring citizens have a consistent and high level of environmental protection; and

WHEREAS the State of Idaho and the Province of British Columbia share extraordinary and unique regional ecosystems seamless to a physical international boundary; and

WHEREAS both governments recognize environmental concerns and impacts respect neither geographical nor political boundaries, and that there is significant benefit in cooperation and collaboration on mutual environmental interests; and

WHEREAS the Ministries of the Province and the Executive Departments of the State wish to work together to share information in regard to respective responsibilities, and may enter into specific cooperative arrangements; and

WHEREAS the increased complexity of many environmental issues, particularly inter-jurisdictional impacts, require coordinated responses from both governments;

NOW, THEREFORE, the Province of British Columbia and the State of Idaho undertake to establish the **British**

Columbia/Idaho Environmental Cooperation Initiative to identify, coordinate and promote mutual efforts to ensure the protection, conservation and enhancement of a shared environment, to the benefit of current and future generations.

ACCORDINGLY, the parties will develop an action plan within one year of signing this arrangement that will form the basis of this effort, reflecting mutual priorities. The Parties may also enter into specific arrangements necessary to effectively address shared environmental goals.

DATED

This 14 day of September, 2003

/s/ Gordon Campbell
Gordon Campbell, Premier
Province of British Columbia

/s/ Dirk Kempthorne
Dirk Kempthorne,
Governor
State of Idaho

Province of British Columbia

State of Montana

ENVIRONMENTAL COOPERATION ARRANGEMENT

Between the Province of British Columbia
and the State of Montana.

WHEREAS the Province of British Columbia and the State of Montana are committed to ensuring a consistent and high level of environmental quality for their citizens; and

WHEREAS the State of Montana and the Province of British Columbia share spectacular and priceless regional ecosystems which transcend the international boundary between them; and

WHEREAS both governments recognize that environmental concerns and impacts respect neither geographical nor political boundaries, and that there is significant benefit in cooperation and collaboration on mutual environmental interests; and

WHEREAS the Ministries of the Province and the Executive Departments of the State wish to share information and are prepared to work together with regard to their respective responsibilities, and may wish to enter into specific cooperation arrangements; and

WHEREAS the increased complexity of environmental issues, particularly their inter-jurisdictional impacts, requires coordinated responses from both governments;

NOW, THEREFORE, the Province of British Columbia and the State of Montana undertake to establish the **British Columbia/Montana Environmental Cooperation Initiative** to identify, coordinate and promote mutual efforts to ensure the protection, conservation and enhancement of our shared environment for the benefit of current and future generations.

ACCORDINGLY, the parties will develop an action plan within one year of signing this arrangement which will form part of these efforts, reflecting mutual priorities. The Parties may also enter into specific arrangements necessary to effectively address shared environmental goals.

DATED at Big Sky, Montana
This 14 day of September, 2003

/s/ Gordon Campbell
Gordon Campbell, Premier
Province of British Columbia

/s/ Judy Martz
Judy Martz, Governor
State of Montana

MEMORANDUM OF UNDERSTANDING BETWEEN THE IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY AND THE BRITISH COLUMBIA MINISTRY OF WATER, LAND AND AIR PROTECTION

I. Purpose and Scope

In September 2003, the Governor of Idaho and the Premier of British Columbia signed an Environmental Cooperation Arrangement. It commits the two jurisdictions to "identify, coordinate and promote mutual efforts to ensure the protection, conservation and enhancement of our shared environment for the benefit of current and future generations."

The Arrangement called for the development of an action plan within one year of signing and went on to authorize the state and province to "enter into specific arrangements necessary to effectively address shared environmental goals."

The Idaho Department of Environmental Quality (hereafter DEQ) and the British Columbia Ministry of Water, Land and Air Protection (hereafter the Ministry) are the agencies responsible for implementation. For the purposes of this Memorandum of Understanding (MOU), those agencies shall be deemed the Lead Agencies.

The purpose of this MOU is to set out an action plan to give effect to the Environmental Cooperation Arrangement. This MOU describes approaches to addressing transboundary environmental issues that can be used by the Lead Agencies. It is designed to be general, with the

recognition that subject-specific memoranda may be developed and added as appendices to implement this MOU if the Lead Agencies jointly agree to do so. These appendices may include other parties if the Lead Agencies determine that this will be beneficial.

II. Responsibilities

DEQ is Idaho's main environmental protection agency, with lead responsibility for air and water quality, waste management and remediation, and assistance and education to citizens and businesses on environmental issues. The Department's mission is to protect human health and preserve the quality of Idaho's air land and water for use and enjoyment today and in the future.

The Ministry is responsible for environmental protection and water, land and air quality, the stewardship of biodiversity, park and wildlife recreation management, and environmental monitoring and enforcement in British Columbia. The Ministry's vision is a clean, healthy and naturally diverse environment that enriches people's lives, now and in the future.

III. Provisions

The Ministry and DEQ wish to maximize efficiency and effectiveness, and to cooperate in a spirit of partnership. Toward this end, they agree to make every effort to share information, consult with one another, and coordinate their work on environmental issues that affect resources and residents in the border region.

The DEQ Coeur d'Alene Regional Office Administrator and the Ministry's Regional Manager Environmental Protection

in Penticton will be the designated lead liaisons for cross-border communications to serve as points of contact on issues related to the Environmental Cooperation Arrangement and implementation of this MOU;

In particular, the agencies commit to:

- establish communications among staff members working on issues with cross-border impacts to enable open sharing of information and awareness of processes for public review and comment;
- provide referrals to other agencies within the state and province when an environmental issue needing resolution does not fall within the responsibilities of the lead agency; and
- establish working relationships with regional representatives of federal agencies and Indian tribes to facilitate cooperation on appropriate issues.

In accordance with implementing appendices to be developed by the Lead Agencies, DEQ and the Ministry will:

- include the regional office of the other jurisdiction in the distribution of environmental assessments developed by DEQ or the Ministry for major projects likely to have cross-border impacts;
- develop notification procedures to identify environmental problems or sources of controversy to residents or government agencies in the border region;
- establish procedures to cooperatively respond to emergencies that could cause environmental harm or damages.

IV. Dispute Resolution

In the spirit of partnership and the efficient use of public resources, the parties agree to attempt to resolve disputes or conflicts at the lowest possible staff level. Issues will be elevated to more senior management levels within each agency as needed to achieve resolution. The mutual goal shall be to ensure the rapid resolution of disagreements before negative impacts on the environment or economy occur.

V. Terms of this Memorandum of Understanding

This agreement shall be effective when signed by both parties. It may be amended at any time by agreement between the parties and may be terminated by either party upon 30 days written notice to the other.

IN WITNESS OF THE AGREEMENT TO ADHERE TO THE TERMS OF THIS MEMORANDUM OF UNDERSTANDING, the parties have executed it by their signatures:

/s/ Steve Allred
Steve Allred
Director
Idaho Department of
Environmental Quality

/s/ Gord Macatee
Gord Macatee
Deputy Minister
Ministry of Water,
Land and Air Protection